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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218363
Party	Defendant Mr. Foamer, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Opposition No. 91218363

NEW WAVE INNOVATIONS INC.
Opposer

vs.

MR. FOAMER, INC.
Applicant

_____ /

**MR. FOAMER’S OPPOSITION TO NEW WAVE INNOVATIONS’ MOTION
FOR ENTRY OF JUDGMENT ON THE RECORD**

MR. FOAMER, INC. (“MR. FOAMER” or “Applicant”) submits this Opposition to NEW WAVE INNOVATIONS, INC. (“NEW WAVE” or “Opposer”) Motion for Entry of Judgment on the Record filed in the above-captioned opposition (the “Motion”) before the Trademark Trial and Appeal Board (the “Board”).

PROCEDURAL BACKGROUND

On September 16, 2014, Opposer filed the above-captioned opposition with the Board. In response, Applicant filed a motion to dismiss. Subsequently, Opposer filed an amended opposition on November 13, 2014 based on two grounds, namely, a claim of priority of use and likelihood of confusion (Count I) and a claim for fraud (Count II) (the “Amended Opposition”). Applicant filed a motion to dismiss the Amended Opposition on November 18, 2014 (the “Motion to Dismiss”).

On April 3, 2015, the Board issued an order (the “Order on the Motion to Dismiss”). In the Order on the Motion to Dismiss, the Board held that Opposer sufficiently pled a claim for likelihood of confusion and priority. With respect to fraud, the Board found that “the amended notice of opposition is legally sufficient as to ... [the]

claim of fraud based on Applicant's asserted failure to use the mark with the listed services at the time the application was filed" (Order on the Motion to Dismiss, pp. 7-8). The additional fraud claims made by Applicant were dismissed and the Board granted Opposer leave to amend these claims within ten days (Order on the Motion to Dismiss, p. 8). However, Opposer did not amend its fraud claims.

On July 10, 2015, Applicant filed its answer to the Amended Opposition (the "Answer"). Subsequently, the parties filed a joint stipulation regarding the admission of evidence (the "Stipulation"). The Board denied the entering of the Stipulation on October 21, 2015 for being too vague.

On December 10, 2015, Opposer filed a motion captioned "Motion for Judgment on the Pleadings" which was two-fold: 1) the alleged priority of use of the MR FOAMER Mark by Opposer, and 2) a claim of judicial estoppel (the "Motion"). On December 19, 2015, the Board issued an order stating that: "inasmuch as the amended notice of opposition does not include a claim of judicial estoppel, no consideration will be given to Opposer's motion for summary judgment on the unpleaded claims" ("Order of December 2015," p. 1). Based on the Board's Order of December 2015, Applicant will not address Opposer's claim of judicial estoppel found on pages 7 to 9 of the Motion.

MEMORANDUM OF LAW IN SUPPORT OF APPLICANT'S OPPOSITION

The Motion is captioned a "Motion for Entry of Judgment on the Record." Yet, the Motion relies on matters outside the pleadings and fails to rely on undisputed facts. As such, the Motion should be denied (I). In the alternative, if the Board elects to treat the Motion as a motion for summary judgment, the Motion should also be denied (II).

I. THE MOTION FOR ENTRY OF JUDGMENT ON THE RECORD SHOULD BE DENIED

A. STANDARD FOR FILING MOTIONS FOR ENTRY OF JUDGMENT ON THE RECORD

A party may file a motion for entry of judgment on the record, which motion is:

“A test solely of the undisputed facts in all the pleadings, supplemented by any facts of which the Board will take judicial notice. For purposes of the motion, all well pleaded factual allegations of the non-moving party must be accepted as true, while those allegations of the moving party which have been denied (...) are deemed false. Conclusions of law are not taken as admitted (...) All reasonable inferences from the pleadings are drawn in favor of the non-moving party. *Id.* Further, a judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the substantive merits of the controversy, as a matter of law.”

Kraft Group LLC v. Harpole, 90 USPQ2d 1837, 1840 (TTAB 2009), *dismissed in favor of a cancellation proceeding*, slip op. Opposition No. 91185033 (TTAB September 5, 2011).

B. THE MOTION FOR ENTRY OF JUDGMENT ON THE RECORD SHOULD BE DENIED BECAUSE THE MOTION IS BASED ON DISPUTED FACTS AND THE MOTION CONTAINS MATTERS OUTSIDE THE PLEADINGS

In the Motion, Opposer requests entry of judgment on the record based on its claim that “[t]he Record before the TTAB establishes the NWI prior adoption and use of the MR. FOAMER mark in December 2011” (Motion, p. 5). Here, the Motion should be denied because the facts on which Opposer relies are not undisputed facts.

First, Opposer alleges that Opposer was “the first to adopt and use the MR FOAMER mark for the distribution and sale of commercial car wash products on the internet” (Motion, p. 1, B, 1. a.) This fact, also found in the Amended Opposition, is disputed by Applicant as Applicant denied this fact in its Answer by stating that:

“Applicant denies the allegations in Paragraph 1.A. first indent” (see Answer, p. 1, 1., A., first indent). Thus, because this allegation was denied by Opposer, it is deemed false for the purpose of a motion for entry of judgment on the record. *Kraft Group LLC v. Harpole*, 90 USPQ2d 1837, 1840 (TTAB 2009).

Further, Opposer also alleges that “[t]here is a likelihood of confusion in the marketplace.” (Motion, p. 1, B, 1. a.) Yet, in its Answer, Applicant denied all the allegations made in the Amended Opposition by Opposer with respect to the alleged existence of likelihood of confusion (see Answer, pp. 1-2). Therefore, because these allegations were denied by Opposer, they are deemed false for the purpose of a motion for entry of judgment on the record. *Kraft Group LLC v. Harpole*, 1840. Moreover, these allegations amount to conclusions of law and are not deemed admitted for the purposes of a motion for entry of judgment on the record. *Id.*

As a result, the two primary alleged undisputed facts on which Opposer relies upon have actually been disputed by Applicant in its Answer. Thus, the Motion does not rely on undisputed facts and should be denied on that basis.

Moreover, the Motion should be denied because it relies on matters outside of the pleadings. Indeed, Opposer relies on documents that are part of the record from a prior federal action between the parties, *New Wave Innovations, Inc. v. James McClimond et al.*, Case No. 2013-cv-22541 (the “Federal Case”). As the Board knows, the parties sought to include the entire record from the Federal Case by filing the Stipulation. However, the Board denied entering the Stipulation into the record for being too vague. Therefore, the documents from the Federal Case are not part of the record in the present Opposition. Notwithstanding the Board’s order denying the entering of the Stipulation,

Opposer relies on the following documents from the Federal Case: a) the answer to the first amended complaint filed in the Federal Case (Motion, p. 3, B, 5, c.); and b) the hearing transcript for the October 29, 2013 evidentiary hearing held in the Federal Case (Motion, Section B, 5, g., i to iii. at pp. 3-5).

As a consequence, Opposer's Motion for Entry of Judgment on the Record should be denied on two bases. First, the Motion should be denied as the Motion does not rely on undisputed facts. Second, the Motion should be denied as the Motion contains matters outside the pleadings, namely, the Motion relies upon the answer to the first amended complaint in the Federal Case and relies upon the hearing transcript for a hearing held in the Federal Case, two documents that are not part of the record before the Board.

II. IN THE ALTERNATIVE, THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

A. STANDARD FOR FILING MOTIONS FOR SUMMARY JUDGMENT

When a party files a motion for entry of judgment on the record and when the moving party presents matters outside the pleadings in its motion, the Board may treat the motion as a motion for summary judgment if the Board chooses not to exclude such matters. T.B.M.P. §504.03. The rules for motions for summary judgment then apply.

Pursuant to Federal Rule of Civil Procedure 56(a), a party may file a motion for summary judgment by showing that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. The moving party asserting that a fact is undisputed must support its assertions by citations to the materials in the record. Fed. R. Civ. P. 56(c)(1)(A). The type of evidence which may be used in support or opposition to a motion for summary judgment includes depositions,

documents, affidavits, declarations, admissions, interrogatory answers, or other materials of record. T.B.M.P. 528(a)(1). The record also includes the pleadings before the Board and the file of any application subject to the proceeding. A party may also make of record testimony from other proceedings upon motion to the Board. 37 C.F.R. 2.122(f).

B. THE MOTION SHOULD BE DENIED AS THERE EXISTS A GENUINE DISPUTE AS TO THE MATERIAL FACTS ALLEGED BY OPPOSER

The Motion should be denied as there exists a genuine dispute as to the material facts alleged by Opposer, namely, that: a) Opposer was first to adopt and use the MR FOAMER mark in connection with the distribution and sale of commercial car wash products on the Internet; and that b) there is a likelihood of confusion in the marketplace.

1) The Motion Should be Denied Because Opposer is Not the Senior User of the MR FOAMER Mark

a. Use Requirements for Service Marks

In a proceeding before the Board, the plaintiff must prove priority of use of the mark such as prior trademark or service mark use. In the absence of a pleaded registration, the moving party must show prior common law use of the mark. *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1023 (TTAB 2009). Use of a service mark requires that there exists a direct association between the mark and the service. *In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456 (C.C.P.A. 1973). When reviewing a specimen of use, the reference to the services must not be so vague that the services cannot be discerned. *In re Chengdu AOBI Info. Tech. Co.*, 111 USPQ2d 2080, 2082 (TTAB 2011).

Further, the service mark must be used in a way that makes a commercial impression separate and apart from the other elements of the advertising matter, in order

for the mark to be recognized by customers as a source identifier. *In re C.R. Anthony Co.*, 3 USPQ2d 1894 (TTAB 1987). The mark must not blend so well with other matter that it is difficult to discern what the mark is. *In re McDonald's Corp.*, 229 USPQ 555 (TTAB 1985).

Even further, the name or design of a character is not registrable as a service mark if it is used only to identify the character. *In re Hechinger Inv. Col. Of Del.*, 24 USPQ2d 1053 (TTAB 1991). The name of a character is registrable only if it is used in a manner that would be perceived by purchasers as identifying the services in addition to the character. *In re Fla. Cypress Gardens Inc.*, 208 USPQ 288 (TTAB 1980).

b. Opposer Did Not Use the MR FOAMER Mark as a Service Mark

Here, Opposer did not establish prior common law use of the MR. FOAMER Mark. Indeed, notwithstanding the fact that Opposer alleges Opposer was the first to use the MR FOAMER Mark for the “distribution and sale of commercial car wash products on the internet” (Motion, p. 1, B., 1., a.), Opposer’s allegations are not supported by any evidence of record.

In the Motion, Opposer’s claim of priority of use is based on Opposer’s alleged use of the MR FOAMER Mark on a Christmas card (the “2011 Card”) in December 2011 (Motion, p. 4, B., 5., g., iii.) A copy of the 2011 Card was filed in the trademark application for the MR FOAMER Mark filed by Opposer, App. Serial No. 86/304,665 (a copy of the 2011 Card is attached as **Exhibit “1”**)¹. The 2011 Card is composed of the

¹ Applicant would like to point to the Board that the card attached as Exhibit 2 to the Amended Opposition is not the 2011 Card (as Opposer improperly suggests) as it states that Opposer would like to introduce its new 2014 products and also offers free shipping on all products until January 31, 2014 (Am. Opp., Exh. 2).

design of a cartoon character, wearing a Santa hat and holding a banner with the message: “Christmas Wishes from mr foamer” (Opp., Exh. 1). In support of its allegation of use of the MR FOAMER Mark, Opposer cites to the testimony of Michael Ross (“Ross”), the president of Opposer’s company (Motion, p. 4). The testimony of Ross was taken in the Federal Case during a hearing on Opposer’s motion for a preliminary injunction held on October 29, 2013 (the “October 2013 Hearing”). During the October 2013 Hearing, Opposer admitted that Opposer had only used the term MR. FOAMER in commerce in the 2011 Card (Transcript of October 2013 Hearing, attached as **Composite Exhibit “2,”** Hearing Tr. at 25:24-26:3). Opposer also admitted that Opposer made no offer to sell services or products in the 2011 Card (Comp. Exh. 2, Hearing Tr. at 80:1-25). Opposer further admitted that the MR. FOAMER Mark as used in the 2011 Card only referred to a “fictional name of [the] character being represented” or the “representation of our product” (Comp. Exh. 2, Hearing Tr. at 80:19-25).

Therefore, the testimony of Ross demonstrates that Opposer did not use the MR FOAMER Mark in commerce in connection with the “distribution and sale of commercial car wash products on the internet” as Opposer claims in the Motion (Motion, p. 1, B., 1., a.) Even Opposer admits that its alleged first use of the MR FOAMER Mark was to refer to a cartoon character and not to a product sold or service offered by Opposer (Comp. Exh. 2, Hearing Tr. at 83:2-11). Thus, Opposer’s use of the term MR FOAMER in the 2011 Card is not a trademark use from which trademark rights can arise. The 2011 Card does not show use of the MR FOAMER Mark in commerce in connection with the services Opposer claims it uses the MR FOAMER Mark. Indeed, there is no connection between the MR FOAMER Mark and services consisting of the “distribution and sale of

commercial car wash products on the internet” (Motion, p. 1, B., 1., a.) The 2011 Card does not even vaguely refer to such services so that the services allegedly offered under the MR FOAMER Mark cannot be discerned in the 2011 Card. In addition, the term MR FOAMER as used in the 2011 Card do not function as a mark because the term MR FOAMER blends with the rest of the sentence in which it is used and thereby creates no distinct commercial impression from the rest of the 2011 Card to prospective customers. Most importantly, the term MR FOAMER is only used to identify a character which is not registrable as a service mark unless the mark is used in a manner that would be perceived by purchasers as identifying the services in addition to the character. In the present case, the term MR FOAMER is only used to refer to the character being depicted on the 2011 Card, and not to refer to distribution services on the Internet.

Based on the foregoing, the MR FOAMER term was not used in a trademark manner by Opposer in the 2011 Card.

Moreover, according to Opposer, the 2011 Card included a discount coupon (Motion, p. 4, B., 5., g., ii.; also Am. Opp., Exh. 3) However, a review of the coupon shows no use of the term MR FOAMER to refer to a product sold by Opposer or a service offered by Opposer (Am. Opp., Exh. 3). Therefore, the coupon did not show use of the MR FOAMER Mark in connection with the services Opposer claims Opposer used the MR FOAMER Mark for, namely, the “distribution and sale of commercial car wash products on the internet” (Motion, p. 1, B., 1., a.)

Finally, during the October 2013 hearing, Opposer admitted that Opposer never used the term MR FOAMER in any manner after the 2011 Card (Comp. Exh. 2, Hearing Tr. at 25:24-26:3) and only planned on using the term MR. FOAMER again in its next

Christmas card. (*Id.*, Hearing Tr. at 46:14-23). Thus, from December 2011 until October 2013 (date of the hearing), Opposer admitted it made no use of the term MR. FOAMER after its one-time use in the 2011 Card in December 2011. Of import, because Applicant started using the MR. FOAMER Mark in August 2012 in connection with its online retail store services,² Applicant is the senior user of the MR FOAMER Mark.

As a result, Opposer's claims that Opposer "was the first to adopt and use the MR FOAMER mark for the distribution and sale of commercial car wash products on the internet" (Motion, p. 1, B., 1., a.) and that the "Record before the TTAB establishes the NWI prior adoption and use of the MR FOAMER mark in December 2011" (Motion, p.5) are not supported by evidence of record. To the contrary, Applicant was the first to use the MR FOAMER Mark in commerce in August 2012 and Applicant is the prior user of the MR FOAMER Mark. As a consequence, Opposer is not the senior user of the MR FOAMER Mark and Opposer's motion for summary judgment should be denied on that basis.

2) Applicant is the Prior User of the MR FOAMER Mark and Has Used the MR FOAMER Mark in Connection with Services Since At Least August 10, 2012

At the outset, it is important to stress out that Applicant's company, Mr. Foamer, Inc., was incorporated in the State of Florida in July 2012 (Amended Opposition, p. 2, 1., A., second indent).

After incorporating its company, on August 10, 2012, Applicant started using the

² Of note, Opposer claims that Applicant received a copy of the Card because Application was a customer of Opposer in December 2011. However, the invoices attached by Opposer in support of its allegation are addressed to Car Wash Experts, and not Applicant. Opposer's allegations that the 2011 Card was received by Applicant were also denied by Applicant in the Federal Case and in the Answer to the Amended Opposition.

MR. FOAMER Mark in commerce in connection with its online retail store found on Applicant's website featuring commercial car wash products (the "Online Store Services"). The use of the MR FOAMER Mark in connection with the Online Store Services was made on Applicant's website located at www.mrfoamer.net and specimens of use were filed with the USPTO in the application for the MR FOAMER Mark, App. Serial No. 86/108,666 (a copy of the specimens of use filed with App. Serial No. 86/108,666 are attached as **Composite Exhibit "3"**). As of today, Applicant continues to use the MR. FOAMER Mark in connection with its Online Store Services on its website (excerpted pages from Applicant's website as of December 28, 2015 showing use of the MR FOAMER Mark in connection with Online Store Services are attached as **Composite Exhibit "4"**). As a result, Applicant has trademark rights in the MR. FOAMER Mark that Applicant has been using in commerce in connection with its Online Store Services since August 10, 2012.

In addition, Applicant has used the MR. FOAMER Mark in connection with installation and maintenance of car wash equipment and parts thereof. Applicant has used the MR. FOAMER Mark in connection with its installation and maintenance services since November 2, 2013 (the "Installation Services"). The use of the MR FOAMER Mark in connection with the advertising of Applicant's Installation Services was made on Applicant's website located at www.mrfoamer.net (excerpted pages of Applicant's website showing use of the MR FOAMER Mark in connection with the Installation Services are attached as **Exhibit "5"**). As a result, Applicant has trademark rights in the MR. FOAMER Mark that Applicant has been using in commerce in

connection with the advertising of its services, namely, the Installation Services since November 2, 2013.

Finally, Opposer's allegations that Applicant admitted not to have used the MR FOAMER Mark are misleading. Indeed, Opposer claims that Applicant "explicitly acknowledged on October 21, 2013, in an affidavit file by the MFI president that: 'That Mr. Foamer does no use a trademark containing the term "MR. FOAMER' in connection with the sale of any product.'" (Motion, p. 3, B., 5., f.)(emphasis added). Here, Opposer cites to eight pages from the Affidavit of James McClimond, the president of Applicant's company ("Applicant's Affidavit"). Importantly, Applicant's Affidavit was executed on October 21, 2013, and, as of October 21, 2013, Applicant did not sell any products under the name MR FOAMER. This fact was confirmed a few days later by Applicant during the October 2013 hearing where Applicant confirmed that Applicant never sold a product called the MR FOAMER product. (Motion, Exh. 5). Similarly, Opposer cites to Applicant's president testimony, James McClimond, who testified in the Federal Case that Applicant never sold a product called a "Mr. Foamer" (Motion, p. 4, B., 5., g., i.) Once again, this testimony is truthful, as Applicant has never sold a product called the "MR. FOAMER." This is also the reason why the Application subject to the present Opposition is filed in three classes including one class for goods which is the only class filed on an intent-to-use basis as Applicant has yet to use the MR FOAMER Mark in connection with the sale of goods. As of today, Applicant still does not use the MR FOAMER Mark on a product sold by Applicant.

Still, Opposer alleges that, in the Answer to the amended complaint filed in the Federal Case, Applicant "denied any use of the MR FOAMER trademark." (Motion, p. 3,

B., 5., c.) In support, Opposer cites to the answer to the first amended complaint filed in the Federal Case by Applicant. In the answer to the first amended complaint, Applicant denied using any of the marks of Opposer. However, Opposer fails to mention to the Board that the marks listed in the first amended complaint and serving as a basis for the allegations made by Opposer did not include the MR FOAMER Mark (a copy of the first amended complaint is attached as **Exhibit “6”**). Indeed, in the first amended complaint, Opposer defined Opposer’s marks as including “the unregistered trademarks Turbo Foam, Turbo Foam Generator and Elephant Ear Foam Application (collectively also ‘NEW WAVE MARKS’).” (Opp., Exh. 6, at ¶22). As such, because the MR FOAMER Mark was not part of the trademarks of Opposer as defined in the first amended complaint, Applicant rightfully stated in its answer to the first amended complaint that Applicant did not use in commerce the trademarks of Opposer which did not include the MR FOAMER Mark. Here, Opposer seeks to confuse the Board and take advantage of the Board’s lack of specific knowledge of the Federal Case which contains over hundreds of docket entries and several amended pleadings. As a result, Opposer’s allegation that Applicant denied using the MR FOAMER Mark in commerce is disputed, false, misleading and unsupported by evidence of record.

As a consequence, in light of the evidence of record, Applicant has used the MR FOAMER in connection with its online retail store services as early as August 10, 2012. Opposer’s allegations that Applicant denied using the MR FOAMER Mark are misleading and unsupported by evidence of record. In sum, Applicant is the senior user of the MR FOAMER Mark and Opposer’s Motion based on priority of use of the MR FOAMER Mark by Opposer should be denied.

3. The Motion Should be Denied Because There is no Likelihood of Confusion

In the Amended Opposition, Opposer alleged that there existed a likelihood of confusion between Opposer's use of the MR FOAMER Mark and Applicant's use of the MR FOAMER Mark. In the Motion, Opposer only refers to this ground of opposition in one sentence which consists of a legal conclusion with no support on the record, namely Opposer states: "the MFI registration of the MR FOAMER mark, for commercial car wash products, shall further compound the likelihood of confusion, as to the NWI and MFI competing products, the source of such products and suggestion of affiliation of the parties" (Motion, p. 6). This unsupported allegation is contradicted by prior admissions made by Opposer in the Federal Case. In fact, in response to an interrogatory requesting Opposer to identify specific instances of actual confusion from consumers between the New Wave Marks and the Mr. Foamer Marks, Opposer admitted that "the instances of actual confusion with Mr. Foamer are largely anecdotal" (a copy of the responses to interrogatories directed to Opposer from the Federal Case are attached as **Exhibit "7"**) (see Exh. 7 at 13).

Here, Opposer neither analyzes the likelihood of confusion factors nor supports its assertions of likelihood of confusion by citations to materials in the record. Fed. R. Civ. P. 56(c)(1)(A). As a result, the Motion based on the claim of likelihood of confusion should be denied by the Board.

C. THE BOARD SHOULD DISPOSE OF THE CASE WITHOUT CONSIDERING OPPOSER'S FRAUD CLAIM

A motion for summary judgment should be filed in single form. T.B.M.P. 528.01.

Further, the Board may enter partial summary judgment on one ground and may dispose of the case without considering the other grounds. *Id.* Also, *Compare Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171-72 (TTAB 2013).

As the Board is aware, one of the grounds listed in the Amended Opposition was fraud. Per the Board's order of April 3, 2015 on the Motion to Dismiss, the Board found that "the amended notice of opposition is legally sufficient as to ... [the] claim of fraud based on Applicant's asserted failure to use the mark with the listed services at the time the application was filed." (Order on the Motion to Dismiss, pp. 7-8). With respect to the additional fraud allegations made by Applicant in the Amended Opposition, these claims were dismissed by the Board³.

As a result, because Opposer failed to include its fraud claim in the Motion and because Opposer's claim of priority and likelihood of confusion should be denied, the Board may dispose of the Motion without considering Opposer's fraud claims.

WHEREFORE, Applicant respectfully requests that the Motion be denied by the Board in its entirety. If the Board treats the Motion as a motion for summary judgment, the Board should deny the Motion and should dispose of the case without giving consideration to the fraud claims.

Dated: December 28, 2015

Respectfully submitted,
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³ Even though the Board granted leave to amend to Opposer, Opposer failed to amend its Amended Opposition.

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CERTIFICATE OF SERVICE

I hereby certify that this Opposition is being electronically transmitted in PDF format to the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals (ESTTA) on the date indicated below. I hereby further certify that on the date indicated below true and complete copy of this Opposition has been served on opposing counsel listed below by electronic mail.

/s/ Isabelle Jung
Isabelle Jung
December 28, 2015

John H. Faro
johnf75712@aol.com
john75712@gmail.com

EXHIBIT 1

2011 CARD



COMPOSITE EXHIBIT 2

OCTOBER 2013 HEARING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 13-22541-CIVIL-COOKE

NEW WAVE INNOVATIONS, INC., Miami, Florida
Plaintiff, October 29, 2013
vs. 10:18 a.m. to 4:43 p.m.
JAMES McCLIMOND,
MR. FOAMER, INC., and
CAR WASH EXPERTS, INC.,
Defendants. Pages 1 to 286

MOTION FOR PRELIMINARY INJUNCTION
FOR TRADEMARK AND TRADE DRESS INFRINGEMENT
BEFORE THE HONORABLE WILLIAM C. TURNOFF,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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I N D E X

	<u>Direct</u>	<u>Cross</u>	<u>Red.</u>
<u>WITNESSES FOR THE PLAINTIFF</u>			
Michael James Ross	38	76	
Timothy Sean Reilly	121	134	
Courtney Chenoweth	141	143	155
<u>WITNESSES FOR THE DEFENDANTS</u>			
James McClimond	161	190	227
			<u>PAGE</u>
<u>EXHIBITS RECEIVED IN EVIDENCE</u>			
Plaintiff's Exhibit No. 16			239

1 Christmas card solicitation back in November of --

2 THE COURT: And then next when did he use it?

3 MR. FARO: When he learned of the confusion between --

4 THE COURT: So this is July of 2012?

5 MR. FARO: I'm trying to respond to the question, sir.

6 He suspended the use of the mark when he found out that
7 there was a company out in Florida that was using Mr. Foamer.

8 And the products that the company in Florida was
9 distributing were virtually indistinguishable from his product
10 and he did not want to --

11 THE COURT: No. My question was --

12 MR. FARO: He suspended using it when he found out --

13 THE COURT: That wasn't my question.

14 MR. FARO: I'm sorry. I'm sorry.

15 THE COURT: My question was -- we'll start all over
16 again -- he sends out a Christmas card in December of 2011.
17 That's your client.

18 MR. FARO: Yes, sir.

19 THE COURT: What's the first time after he sent out the
20 Christmas card that he started manufacturing or distributing or
21 whatever a product called Mr. Foamer?

22 MR. FARO: He never has done that. He's never
23 distributed a Mr. Foamer brand of product.

24 THE COURT: So now he gets a call from somebody in
25 North Florida or something. Right?

1 MR. FARO: That's correct.

2 THE COURT: When was that call?

3 MR. FARO: I believe October of 2012.

4 THE COURT: If your client hadn't used the term
5 "Mr. Foamer" other than in a Christmas card, why would he be
6 getting a call from somebody inquiring about buying a product
7 using a similar name when your client was not distributing or
8 manufacturing a product called Mr. Foamer?

9 MR. FARO: Because the products of the two companies
10 are virtually indistinguishable in overall appearance and
11 when --

12 THE COURT: In appearance?

13 MR. FARO: That is correct.

14 And when the client --

15 THE COURT: Wait. Wait, Mr. Faro.

16 MR. FARO: Yes, sir.

17 THE COURT: And so your client at the time he sent out
18 the Christmas card was manufacturing and/or distributing a
19 cleaning product. Correct?

20 MR. FARO: Turbo Foam Generator.

21 THE COURT: Turbo Foam Generator.

22 MR. FARO: That's correct.

23 THE COURT: And he was using the name Turbo Foam
24 Generator prior to Christmas and at the time of the card and
25 thereafter. Right?

1 abandonment of the mark. In this case --

2 THE COURT: Cause the what of the mark?

3 MR. FARO: I'm sorry? Mr. Foamer.

4 THE COURT: To cause the what of the mark?

5 MR. FARO: Abandonment of the mark.

6 THE COURT: Abandonment.

7 MR. FARO: That's correct.

8 There's no evidence and there's no -- nothing that can
9 be pointed to to show abandonment of the mark. In fact, there
10 was an effort made by my client to informally resolve the use
11 of the Mr. Foamer mark and the confusingly similar trade dress,
12 which was ineffective, thus lawsuit.

13 Mr. Ross will testify as to his concerns and why he did
14 that.

15 He's going to resume the use of the Mr. Foamer mark for
16 this holiday season and continue using it in some fashion as to
17 hopefully avoid any overlap or infringement -- confusion,
18 rather, with respect to Mr. Foamer, Inc.

19 Presumably, if we can get an injunction, then that
20 won't be a problem.

21 THE COURT: Let me ask you a question. Nobody's to
22 read anything into my questions, comments or poor attempts at
23 humor.

24 Has your client at any time through today used the
25 title Mr. Foamer?

1 MR. FARO: Not other than in the Christmas card, sir.

2 THE COURT: Only the Christmas card.

3 MR. FARO: That's correct.

4 THE COURT: But what he intends to do is start using
5 the name Mr. Foamer. Right?

6 MR. FARO: That's correct.

7 He's going to start -- he's going to resume his use
8 particularly in the holiday season as --

9 THE COURT: Resume his use on products that he
10 presently manufactures and/or distributes?

11 MR. FARO: It's a service mark. It's not a trademark.
12 So it is as to identify his company as Mr. Foamer, an
13 authoritative source of car wash products.

14 THE COURT: Right now the company is known as what?

15 MR. FARO: New Wave Innovations, Inc.

16 THE COURT: New Wave Innovations, Inc.

17 And that's how he markets his products. Right?

18 MR. FARO: That's correct.

19 THE COURT: Okay. And so he wants to start using
20 Mr. Foamer now?

21 MR. FARO: He wants to resume it. That's correct.

22 THE COURT: Resume what he used in a Christmas card?

23 MR. FARO: That's correct.

24 THE COURT: Okay. Go ahead.

25 MR. FARO: The extent of use has been challenged. The

1 Defendants, did you have any concerns and express those
2 concerns to anybody else regarding your continued use of the
3 Mr. Foamer service mark as depicted in your Christmas card?

4 A. Can you elaborate?

5 Q. Let me restate that.

6 A. Yes.

7 Q. Once you became aware that there were -- there was another
8 company using Mr. Foamer and you had some experience with
9 customers calling you and complaining about Mr. Foamer
10 products, did you have any concerns regarding your continued
11 use of the Mr. Foamer service mark?

12 A. Yes.

13 Q. Could you explain those, please.

14 A. With the confusion that was starting to present itself, I
15 suspended the use of the Mr. Foamer Christmas card or any other
16 form of our generator holiday special until the matter could be
17 resolved.

18 THE COURT: Well, you sent out the Christmas card,
19 Mr. Foamer. Right? This one. Right?

20 THE WITNESS: Yes.

21 THE COURT: What else -- how else did you use the name?

22 THE WITNESS: We didn't. We were planning on using it
23 again the following Christmas.

24 THE COURT: So there was no other use, right -- as we
25 speak --

1 THE WITNESS: Correct.

2 THE COURT: -- of Mr. Foamer, right, other than this
3 card? Right?

4 THE WITNESS: Correct.

5 THE COURT: Did you get any calls from anybody saying,
6 "I got your Christmas card. I got this defective product," you
7 know? Any calls like -- directly or indirectly with reference
8 to the Christmas card?

9 THE WITNESS: If they had reference to it, they did not
10 tell me. But that doesn't mean that they did not.

11 THE COURT: Did anybody tell you any other sources,
12 other than YouTube, that they were connecting you with the
13 defective product or unsatisfactory product?

14 THE WITNESS: I think that would be best answered by
15 Courtney, who works in the field.

16 THE COURT: By who?

17 THE WITNESS: By --

18 MR. FARO: We have another declarant here.

19 THE WITNESS: -- another witness.

20 THE COURT: What's your position with the company?

21 THE WITNESS: CEO.

22 MR. FARO: He's -- he distributes the products through
23 distributors. I think you asked him a question regarding the
24 perception of the --

25 THE COURT: You're the capo de capo. Right? You're

1 THE WITNESS: (Complies.)

2 THE COURT: Yeah. I mean, they look basically the
3 same, except the one on your right -- which is the Defendants'
4 product. Right?

5 THE WITNESS: Yes.

6 THE COURT: Because the ears go out a little more.

7 MR. FARO: Well, they're bent down. That's all.

8 THE COURT: Oh. You can bend --

9 THE WITNESS: Actually, if you overlap them, they're
10 exactly the same.

11 THE COURT: Got you.

12 THE WITNESS: The length, the width, the diameter,
13 inside tube. Everything.

14 MR. FARO: As a matter of fact, I think you may testify
15 that the dominant feature of the design is the insert.

16 THE WITNESS: The insert.

17 MR. FARO: The insert.

18 THE COURT: By the way, is that entire exhibit visible
19 to a customer from the outside or is it hidden by something?

20 MR. FARO: Well, the customer being who, sir? The
21 distributor of the product?

22 THE COURT: If I'm washing my car, going through the
23 wash, would I be able to see that whole exhibit, the entire
24 length of it?

25 THE WITNESS: If it's a good car wash, your car will be

1 Q. Now, Mr. Foamer, if I may -- Exhibit No. 1 is the ad for
2 Mr. Foamer? That's ad where -- I'm sorry.

3 This is the Christmas card that you used. Correct?

4 A. Yes.

5 Q. And there's no offer to sell anything in this, is there?

6 A. Yeah. On the inside, actually, there was. We actually did
7 a coupon.

8 Q. There's no offer to sell in this exhibit, is there, sir?

9 A. No.

10 Q. There's no price in this exhibit, is there?

11 A. Anybody who got that had already purchased from us. So
12 they were aware of who it's coming from and our products and
13 what we sell.

14 Q. Okay. So they were -- they would be aware, for instance,
15 that you used the name New Wave Innovations --

16 A. Yes.

17 Q. -- on the Christmas card?

18 A. Yes.

19 Q. And the Mr. Foamer is not the product, is it, sir? It's
20 the cartoon character that's around the product. Correct?

21 A. The Mr. Foamer would be the actual name -- the fictional
22 name of that character being represented.

23 Q. Thank you.

24 So the fictional character is not a product, is it?

25 A. It is a representation of our product.

1 A. No.

2 Q. And my point was -- and I just wanted a quick answer -- you
3 never sold anything called -- you never had a product that was
4 called Mr. Foamer?

5 A. Neither did Mr. Foamer.

6 Q. Is that a "no"?

7 A. That is a "no." But it's to my understanding that I have
8 two years to register the trademark from my use of it.

9 Q. And Mr. Foamer doesn't have a product called a Mr. Foamer.
10 Correct?

11 A. No.

12 Q. Mr. Foamer simply is the name of a company, not a product.
13 Correct?

14 A. Correct.

15 THE COURT: Does Mr. Foamer sell Twist 'n Kleen?

16 MR. PALMER: Yes, your Honor.

17 THE COURT: And that's what -- his product is Twist 'n
18 Kleen?

19 MR. PALMER: Yes.

20 THE COURT: But the company is Mr. Foamer?

21 MR. PALMER: Yes, sir.

22 THE COURT: Got you.

23 I'm allowed to think out loud and nobody's to read
24 anything into my thoughts or questions or anything else.

25 MR. PALMER: Thank you, your Honor.

1 the bowels of the library. I'll take responsibility for this.

2 The witness can resume the stand.

3 You're still under oath.

4 We'll wrap up cross.

5 MR. FARO: Your Honor, the Plaintiff will stipulate
6 that all the component parts of their product is functional.

7 If that's what the testimony was attempting to elicit,
8 we'll stipulate that all the component parts of the device on
9 their product and, as far as we're concerned, the other
10 products have a function.

11 If that's what the testimony is attempting to elicit,
12 we'll stipulate to that in order to help move this along.

13 THE COURT: Counsel?

14 MR. PALMER: That's helpful, your Honor. That'll save
15 us some time.

16 THE COURT: Did I cost another guy his pay raise? He's
17 not here?

18 MR. PALMER: Mr. Greenberg needed to leave, your Honor.
19 He's a single father and needed to pick up his -- I believe
20 it's a son -- from school.

21 THE COURT: I meant no disrespect. I send him my
22 compliments.

23 MR. PALMER: Your Honor, if I could, given the fact
24 that I'm going to get into some testimony where this may be
25 relevant, I'd like to invoke the rule, if I may.

1 perhaps, a superior product, to the one where you can't remove
2 the cap and the media can be pushed down. Correct?

3 A. Yes.

4 Q. And that media, the balls and the scrubber pads that are
5 simply on a rod, that forms a terrific function in making it
6 easier to service. Correct?

7 A. Yes.

8 Q. Thank you.

9 Now, you indicated that you could have a square tube. But
10 it would be difficult to screw on a top when you have a square
11 tube. Correct? You couldn't thread that, could you?

12 A. No. But you can make them out of, you know, anything. It
13 doesn't really matter.

14 Q. But I noticed that everyone in the industry uses a round
15 tube, correct --

16 A. Typically.

17 Q. -- or almost everyone?

18 A. Typically. Yes.

19 Q. And, again, one of the reasons that the scrubber pads are
20 round is simply because the tube itself is round. Correct?

21 A. Yes.

22 Q. You wouldn't want to put a square pad in a round tube?

23 A. You could still force it in there. It wouldn't make any
24 difference.

25 Q. But you'd have to force it and it wouldn't be as simple and

COMPOSITE EXHIBIT 3

**SPECIMENS OF USE OF APPLICANT'S MARK
FILED IN APPL. SERIAL NO. 86/108,666**

MRFOAMER.COM

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MR. FOAMER
Twist 'n Kleen Generator MADE IN THE USA

- Saver \$385
- One Twist to Clean
- Cleans in a Minute
- No Disconnecting Hoses
- No Tools Needed to Clean
- Clear One Piece Body
- Works with All Chemicals
- Generates Thick Foam
- All Stainless Steel Internal Hardware
- Fast & Fully Adjustable Installation
- Easy Installation on Any Manufacturers Equipment
- LIFETIME GUARANTEE on Generator Body*
- PATENT PENDING

Twist 'n SAVE Hybrid TRI COLOR SYSTEM

Side Stick
Top Stick
K Nozzle Side Stick
CTA

For Information Contact

www.mrfoamer.com

* Excludes Fittings and Insert

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C.T.A.



Top Stick



K Nozzle Stick



Top K Nozzle Stick

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We offer the following services locally throughout Florida and nation wide by appointment:

- Complete design and installation of Mr. Foamer™ equipment.
- 3rd party equipment installation including: Tunnels, Self Serve, Automatic's, and Fleet wash.
- Turn key building and tunnel install's featuring The Tommy building.
- Equipment service and maintenance for all types of wash facilities.

Coming Soon

Mr. Foamer™ Wax's and Soap's specially formulated for the Foaminator™ System and all equipment.

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- PATENT PENDING

Twist 'n SAVE Hybrid TRI COLOR SYSTEM

Side Stick
Top Stick
K Nozzle Side Stick
CTA

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* Excludes Fittings and Insert

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C.T.A.



Top Stick



K Nozzle Stick



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- Turn key building and tunnel install's featuring The Tommy building.
- Equipment service and maintenance for all types of wash facilities.

Coming Soon

Mr. Foamer™ Wax's and Soap's specially formulated for the Foaminator™ System and all equipment.

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COMPOSITE EXHIBIT 4

**SPECIMENS OF USE OF APPLICANT'S MARK
USED IN CONNECTION WITH ONLINE STORE
SERVICES AS OF DECEMBER 28, 2015**



Showing 1-24 of 86 results

Grid List

Sort By
Sort by price: high to low ▾

Multi-Source With Back-Up

0 review(s)

\$5,540.00



FOAMINATOR GRAND ARCH

0 review(s)

\$4,999.99



Multi-Source

0 review(s)

\$4,420.00



MD5A-5/7

0 review(s)

\$3,670.00



Pay securely using your bank account.

COMPOSITE EXHIBIT 5

**SPECIMENS OF USE OF APPLICANT'S MARK
USED IN CONNECTION WITH INSTALLATION
SERVICES AS OF DECEMBER 28, 2015**

MR. FOAMERTM

Call us 24/7: (561) 222-5814

A large, colorful sign for 'Mr. Big's Super Car Wash' featuring a blue background with white clouds and yellow text. The sign is shaped like a car wash tunnel, with 'SUPER SHINE' at the top and 'BIG SPLASH' at the bottom. The central part of the sign shows a car being washed by a large, stylized splash of water.



We offer complete equipment installation and service of our products call for more information.

☐ No products were found matching your selection.

EXHIBIT 6

**FIRST AMENDED COMPLAINT FILED BY
OPPOSER IN FEDERAL CASE**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 13-CV-22541-COOKE/TURNOFF

NEW WAVE INNOVATIONS, INC.)
)
Plaintiff)
vs.)
)
JAMES (JIM) MCCLIMOND (AN INDIVIDUAL),)
MR. FOAMER, INC. (A FLORIDA CORPORATION) &)
CAR WASH EXPERTS, INC. (A FLORIDA)
CORPORATION))
)
Defendants)
<hr/>	

AMENDED COMPLAINT
(First)

The Plaintiff, New Wave Innovations, Inc. (hereinafter also "NEW WAVE"), by counsel, alleges for its Complaint, upon knowledge, with respect to its own acts, and upon information and belief as to all other matters, as follows:

Nature of the Action

1. New Wave Innovations, Inc., a California Corporation, based in Lodi, California, brings this action against the Defendants, James (Jim) McClimond, Car Wash Experts, Inc., and Mr. Foamer, Inc., (herein also collectively “MCCLIMOND”) for
- a. False Designation Of Origin under the Lanham Act, 15 U.S.C. § 1125(a);
 - b. Trade Dress Infringement under the Lanham Act, 15 U.S.C. § 1125(a);
 - c. Breach of Confidential Business Relationship, State Law;
 - d. Trademark Infringement, State Law
 - e. Florida Unfair and Deceptive Trade Practices Act, §§ 501.201, et seq., Fla. Stat.

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1121 (original jurisdiction over Lanham Act claims), 28 U.S.C. §1331 (federal question), 28 U.S.C. §1332 (diversity of citizenship); 28 U.S.C. §1338 (original jurisdiction over trademark claims), 28 U.S.C. §1367 (supplemental jurisdiction), and principles of ancillary and pendent jurisdiction.

3. Defendant, Car Wash Experts, Inc., is a Florida corporation, (founded in March 2011), which operates, conducts, engages in, and/or carries on a business in this district (Jupiter, Florida), and is therefore subject to personal jurisdiction in this district.

4. Defendant, Mr. Foamer, Inc., is a Florida corporation (founded in July 2012), which operates, conducts, engages in, and/or carries on a business in this district (Jupiter, Florida), and is therefore subject to personal jurisdiction in this district.

5. Defendant, James (Jim) McClimond, (hereinafter “MCCLIMOND”) is the founder and officer of each of the Defendants Mr. Foamer, Inc., and Car Wash Experts, Inc., and controls and directs the actions of each of the Defendants Mr. Foamer, Inc., and Car Wash Experts, Inc., including the unlawful conduct of the Defendants Mr. Foamer, Inc., and Car Wash Experts, Inc., in this district. MCCLIMOND also resides in this judicial district and is therefore subject to personal jurisdiction in this district.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), § 1391(c), and otherwise because, among other things, MCCLIMOND personally resides in this district and the corporate Defendants which he directs and controls, have a principal place of business in this district and a substantial part of the events or omissions giving rise to this action occurred in this district.

Parties

7. The Plaintiff, NEW WAVE is a California corporation, with its principle place of business in Lodi, California. NEW WAVE designs, engineers, and manufactures innovative and proprietary products for automatic commercial car washes. NEW WAVES markets and distributes its proprietary products, including products incorporating it proprietary “Turbo Foam Technology”, directly to customers and through a distributor network.

8. The Defendant, James (Jim) McClimond (also “MCCLIMOND”), is an individual, and a former distributor of NEW WAVE automatic commercial car wash products and accessories incorporating the NEW WAVE proprietary “Turbo Foam Technology”.

9. The Defendant, Car Wash Experts, Inc., is a Florida corporation, organized and existing under the laws of the State of Florida; and, upon information and belief, was founded by MCCLIMOND to manufacture, market and/or distribute automatic commercial car wash products, including products incorporating the NEW WAVE proprietary “Turbo Foam Technology” and NEW WAVE product designs.

10. The Defendant, Mr. Foamer, Inc., is a Florida corporation, organized and existing under the laws of the State of Florida; and, upon information and belief, was founded by MCCLIMOND to manufacture, market and/or distribute automatic commercial car wash products, including products incorporating the NEW WAVE proprietary “Turbo Foam Technology” and NEW WAVE product designs.

Parties Confidential Business Relationship & History

11. In late October and/or early November 2011, MCCLIMOND contacted NEW WAVE and solicited information relative to the MCCLIMOND distribution of automatic

commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”.

12. Incident to this contact in October-November 2011, between MCCLIMOND and NEW WAVE, MCCLIMOND requested and was provided with NEW WAVE confidential technical, marketing and competitive sales information, relative to automatic commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”.

13. The NEW WAVE confidential technical, marketing and competitive sales information, relative to automatic commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”, referenced hereinabove in Paragraph (12), was provided and entrusted to MCCLIMOND for his use exclusively with the sales, marketing and distribution of unique and distinctive automatic commercial car wash products available from NEW WAVE.

14. The NEW WAVE confidential technical, marketing and competitive sales information, relative to automatic commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”, referenced hereinabove in Paragraph (12), was provided and entrusted to MCCLIMOND, with the agreement, in fact, that such information was to be used for the exclusive benefit of NEW WAVE.

15. The NEW WAVE confidential technical, marketing and competitive sales information, relative to automatic commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”, referenced hereinabove in Paragraph (12), was provided and entrusted to MCCLIMOND, with the agreement, in fact, that such information would not be used and/or disclosed to third party, including specifically an entity competing with NEW WAVE.

16. From about November 2011, through March 2012, MCCLIMOND, ordered approximately \$7,000, in automatic commercial car wash products incorporating the NEW

WAVE proprietary “Turbo Foam Technology”, including products having a distinctive “turbo foam generator” and distinctive “elephant ears” design and appearance, New Wave Innovations Invoice Nos. 156, 166, 179 & 213, annexed hereto as **Composite Exhibit “1”**.

Defendant's Wrongful Acts

17. Upon information and belief, MCCLIMOND used the NEW WAVE information, without authorization or license, to reverse engineer NEW WAVE products, to produce competing automatic commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”, including the slavishly copying the NEW WAVE proprietary and distinctive “Turbo Foam Technology”, and the proprietary and distinctive designs for the “Turbo Foam Generator” and the “Elephant Ears” foam applicator.

18. The commercial environment, and circumstances relative to the qualification of MCCLIMOND as a NEW WAVE distributor, as set forth in Paragraphs 12-15, inclusive, created a confidential business relationship between NEW WAVE and MCCLIMOND, and an agreement, in fact, imposing rights and obligations relative to the use and restraint upon disclosure of NEW WAVE information, which are enforceable under the law, including state and federal law.

19. Notwithstanding the confidential business relationship between NEW WAVE and MCCLIMOND, MCCLIMOND, from and after April 2012, undertook preparations to “knock off” automatic commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”, including the slavish copying of the distinctive and proprietary NEW WAVE Turbo Foam Generator and the distinctive and proprietary NEW WAVE designs for the Turbo Foam Generator and the Elephant Ears Foam Applicator.

20. From and after April 2012, MCCLIMOND undertook to manufacture, market and distribute automatic commercial car wash products, in competition with NEW WAVE,

incorporating the NEW WAVE proprietary “Turbo Foam Technology”, and to manufacture, market and distribute automatic commercial car wash products incorporating the NEW WAVE proprietary trade dress, specifically, a “Twist ‘n Kleen” (Foam) Generator, and Elephant Ears foam applicators, having the same distinctive design and appearance as the NEW WAVE “turbo foam generator” and “elephant ears”.

21. The MCCLIMOND “Twist ‘n Kleen” (Foam) Generator, and Elephant Ears foam applicators, are marketed to the same customers and through the same channels of trade, to the same customers, as are automatic commercial car wash products incorporating the NEW WAVE proprietary “Turbo Foam Technology”.

NEW WAVE Trademarks & Trade Dress

22. NEW WAVE actively promotes its business, its products and its proprietary “Turbo Foam Technology”, under a number of registered and unregistered marks and product designations, which are prominently displayed on its marketing and promotional materials, including the unregistered trademarks *Turbo Foam*, *Turbo Foam Generator* and *Elephant Ear Foam Applicator* (collectively also “NEW WAVE MARKS”).

23. As a result of NEW WAVE’s widespread use and display of its NEW WAVE MARKS, the automatic car wash parts and accessories, which it advertises and markets through various media and in various venues, the public recognizes the NEW WAVE products and services, which are associated with the NEW WAVE MARKS, are regarded as high quality products and emanating from a single source, *i.e.*, New Wave Innovations, Inc., and are therefore, extremely well known, and have established secondary meaning and extensive goodwill.

24. NEW WAVE is the exclusive owner of the NEW WAVE MARKS and has the exclusive right to use and license the NEW WAVE MARKS.

25. NEW WAVE has expended substantial sums in advertising and promoting the NEW WAVE MARKS through print and other media. The NEW WAVE MARKS are therefore well known throughout Florida and the United States.

26. As a result of NEW WAVE extensive sales, advertising, and promotions, the NEW WAVE MARKS are widely and favorably known by distributors for automatic car wash parts and accessories, and to the purchasing public generally as indicating the source of the products and services offered by NEW WAVE, and NEW WAVE has established extraordinary goodwill of incalculable value in the NEW WAVE MARKS for the NEW WAVE “Turbo Foam Technology”.

COUNT I
(Violation of 15 U.S.C. § 1125(1)(A))
Unfair Competition - False Designation Of Origin)

27. The allegations in Paragraphs 7 through 26, inclusive, are incorporated herein by reference.

28. MCCLIMOND has used and is continuing to use one or more of the NEW WAVE MARKS (*Turbo Foam*, *Foam Generator* and *Elephant Ears*), or a similar mark in commerce in connection with automatic car wash parts and accessories in violation of 15 U.S.C. § 1125(a), in that it has falsely designated the origin of its automatic car wash parts and accessories. Such unauthorized use of the NEW WAVE MARKS is a false description and representation that MCCLIMOND’s products and business is legitimately connected with, affiliated with, franchised by, licensed by, or in some other manner sponsored, endorsed or approved by NEW WAVE, and consumers are likely to confuse the two companies. Such likelihood of confusion is further compounded by MCCLIMOND’s adoption of a similar color scheme (blue) similar to NEW WAVE, for its brochures and product literature, so as to further enhance/create the total

commercial impression that NEW WAVE's and MCCLIMOND's originate from a common source or origin,

29. Such conduct by MCCLIMOND causes consumers to believe that MCCLIMOND is in some way affiliated with NEW WAVE or its business, and is designed to take advantage of the reputation and goodwill of NEW WAVE and the Ryder Mark(s). MCCLIMOND's actions in this regard constitute unfair competition with NEW WAVE in violation of 15 U.S.C. §1125(a).

30. MCCLIMOND has unfairly profited from the infringing actions alleged herein.

31. NEW WAVE has incurred, and will continue to incur, actual and substantial damages as a direct and proximate result of MCCLIMOND's knowing and intentional use of such false descriptions or representations. MCCLIMOND's unfair competition, including, without limitation, confusion and deception of the automatic car wash parts customers and distributors, as well as the purchasing public generally, is causing NEW WAVE to incur irreparable injury to NEW WAVE's reputation and goodwill, actual damages, and the expenditure of attorneys' fees.

32. NEW WAVE has no adequate remedy at law. NEW WAVE has suffered irreparable injury to its reputation and goodwill and otherwise, and will continue to suffer irreparable injury unless MCCLIMOND's wrongful acts are enjoined by the Court. Accordingly, NEW WAVE is entitled to preliminary and permanent injunctive relief pursuant to 15 U.S.C. § 1116(a).

33. By reason of MCCLIMOND's willful acts, NEW WAVE is entitled to an equitable accounting, and to recover MCCLIMOND's profits generated in connection with MCCLIMOND's wrongful use of the Ryder Mark(s), recovery of all damages sustained by NEW WAVE, and an award of costs of this action, and NEW WAVE's profit award should be enhanced and its damages trebled pursuant to 15 U.S.C. § 1117(a).

34. This is an exceptional case making NEW WAVE eligible for an award of attorneys' fees under 15 U.S.C. § 1117(a).

COUNT II
(Violation of 15 U.S.C. § 1125(a)(1)(A))
Unfair Competition – Trade Dress Infringement)

35. The allegations in Paragraphs 7 through 26, inclusive, are incorporated herein by reference.

36. MCCLIMOND has used and is using one or more of the NEW WAVE MARKS, specifically, the trade dress associated with the distinctive and proprietary non-functional design features of the NEW WAVE *Turbo Foam Generator* and *Elephant Ears Foam Applicator*, or a similar distinctive non-functional design features, in commerce, in connection with the marketing, sales and distribution of automatic car wash parts and accessories, in violation of 15 U.S.C. § 1125(a)(1)(A), in that it has falsely designated the origin of its automatic car wash parts. Such unauthorized use of the NEW WAVE trade dress is a false description and representation that MCCLIMOND's products and business is legitimately connected with, affiliated with, franchised by, licensed by, or in some other manner sponsored, endorsed or approved by NEW WAVE, and consumers are likely to confuse the two companies. Such likelihood of confusion is further compounded by MCCLIMOND's adoption of a similar color scheme (blue) similar to NEW WAVE, for its brochures and product literature, so as to further enhance/create the total commercial impression that NEW WAVE's and MCCLIMOND's originate from a common source or origin,

37. Such conduct by MCCLIMOND causes consumers to believe that MCCLIMOND is in some way affiliated with NEW WAVE or its business, and is calculated to take advantage of the reputation and goodwill of NEW WAVE and the NEW WAVE MARKS and trade dress.

MCCLIMOND's actions in this regard constitute unfair competition with NEW WAVE in violation of 15 U.S.C. §1125(a).

38. MCCLIMOND has unfairly profited from the infringing actions alleged herein.

39. NEW WAVE has incurred, and will continue to incur, actual and substantial damages as a direct and proximate result of MCCLIMOND's knowing and intentional use of such false descriptions or representations. MCCLIMOND's unfair competition, including, without limitation, confusion and deception of the automatic car wash parts industries, as well as the purchasing public generally, is causing NEW WAVE to incur irreparable injury to NEW WAVE's reputation and goodwill, actual damages, and the expenditure of attorneys' fees.

40. NEW WAVE has no adequate remedy at law. NEW WAVE has suffered irreparable injury to its reputation and goodwill and otherwise, and will continue to suffer irreparable injury unless MCCLIMOND's wrongful acts are enjoined by the Court. Accordingly, NEW WAVE is entitled to preliminary and permanent injunctive relief pursuant to 15 U.S.C. § 1116(a).

41. By reason of MCCLIMOND's willful acts, NEW WAVE is entitled to an equitable accounting and to recover MCCLIMOND's profits generated in connection with MCCLIMOND's wrongful use of the NEW WAVE trade dress, recovery of all damages sustained by NEW WAVE, and an award of costs of this action, and NEW WAVE's profit award should be enhanced and its damages trebled pursuant to 15 U.S.C. § 1117(a).

42. This is an exceptional case making NEW WAVE eligible for an award of attorneys' fees under 15 U.S.C. § 1117(a).

COUNT III

(Breach of Confidential Business Relationship)

43. The allegations in Paragraphs 7 through 26, inclusive, are incorporated herein by reference.

44. As early as March 8, 2011, the novel proprietary functional features of the NEW WAVE Turbo Foam Generator have been the subject of one or more NEW WAVE pending patent applications, Filing Receipt - Provisional Patent Application Serial No. 61/450,278 (filed March 8, 2011) annexed hereto as **Exhibit No. “2”**; Provisional Patent Application Serial No. 61/639,876 (filed April 28, 2012) annexed hereto as **Exhibit No. “3”**;

45. A number of the features and functions of the NEW WAVE Turbo Foam Generator are disclosed and claimed in one or more of the NEW WAVE pending patent applications, and such pending patent applications are and continued to be maintained in secret by the United States Patent & Trademark Office.

46. At all times material hereto, the novel proprietary functional features of the NEW WAVE Turbo Foam Generator have been and continue to be maintained secret and confidential by NEW WAVE; and, where a disclosure thereof, in whole or in part, has been made by NEW WAVE, such disclosure was prefaced by an admonition that such information was confidential and the acknowledgement of the confidential nature thereof by the recipient.

47. Incident to the qualification of a party as a NEW WAVE distributor, NEW WAVE was required to educate its distributors, including MCCLIMOND, as to the unique structure, function and operation of the NEW WAVE Turbo Foam Generator, including, the proprietary and potentially patentable features of the NEW WAVE Turbo Foam Generator, and of the accessories associated therewith. Such “education” necessarily included a discussion of competitive marketing information, economies of operation, maintenance advantages, and the HOW and WHY such functional features achieved these advantageous results (herein also “Know How” & “Show How”).

48. At all times material hereto, the commercial environment, and circumstances relative to the qualification of MCCLIMOND as a NEW WAVE distributor, as set forth in Paragraph 47, created a confidential business relationship, and an agreement, in fact, to maintain

NEW WAVE proprietary information confidential, including specifically the competitive marketing information, economies of operation, maintenance advantages, and the HOW and WHY such functional features achieved these advantageous results.

49. At all times material hereto, the commercial environment, and circumstances relative to the qualification of MCCLIMOND as a NEW WAVE distributor, as set forth in Paragraph 46, obligated MCCLIMOND to maintain the NEW WAVE proprietary and potentially patentable features of the NEW WAVE Turbo Foam Generator, and the accessories associated therewith,

50. At all times material hereto, the commercial environment, and circumstances relative to the qualification of MCCLIMOND as a NEW WAVE distributor, as set forth in Paragraph 46, obligated MCCLIMOND to maintain secret and confidential NEW WAVE proprietary business and technical information.

51. At all times material hereto, the commercial environment, and circumstances relative to the qualification of MCCLIMOND as a NEW WAVE distributor, as set forth in Paragraph 46, obligated MCCLIMOND to refrain from use of the NEW WAVE proprietary business information other than exclusively in conjunction with the distribution of the NEW WAVE Turbo Foam Generator, and the accessories associated therewith, and for no other purpose.

52. Notwithstanding a confidential business relationship, and an agreement, in fact, between MCCLIMOND and NEW WAVE, to maintain NEW WAVE proprietary information confidential and proprietary in confidence, and to refrain from the use thereof except for the exclusive marketing and distribution of the NEW WAVE Turbo Foam Generator, and the accessories associated therewith, MCCLIMOND used and disclosed such information without regard to his obligations to NEW WAVE, and in furtherance of a business which was to compete with NEW WAVE.

53. The MCCLIMOND use and disclosure of NEW WAVE proprietary information, without regard to his obligations to NEW WAVE, as set forth in Paragraph 52, breached his obligation to NEW WAVE under the agreement, in fact, to maintain such proprietary information in confidence and refrain from use thereof other than as authorized.

54. The MCCLIMOND use and disclosure of NEW WAVE proprietary information, without regard to his obligations to NEW WAVE, as set forth in Paragraph 52, has been deliberate and calculated to damage NEW WAVE in its business and in the perception of the NEW WAVE distributors and customers.

55. The MCCLIMOND use and disclosure of NEW WAVE proprietary information, without regard to his obligations to NEW WAVE, as set forth in Paragraph 52, has caused and shall continue to cause, irreparable harm to NEW WAVE, which cannot be adequately compensated by monetary damages.

Count IV
(Trademark Infringement – Florida Common Law)

56. The allegations in Paragraphs 7 through 26, inclusive, are incorporated herein by reference.

57. MCCLIMOND has infringed, and continues to infringe, on NEW WAVE's exclusive rights to the NEW WAVE MARKS and distinctive trade dress, by using, in commerce, the NEW WAVE MARKS, or a colorable imitation of the NEW WAVE MARKS, specifically, the MCCLIMOND marks "*Mr. Foamer Generator*", "*Elephant Ears Foam Applicator*", and distinctive trade dress, in connection with the sale, offering for sale, distribution, or advertising of its product and/or by applying the NEW WAVE MARKS, or a colorable imitation of the NEW WAVE MARKS, to printed materials, products and advertising materials, including but not limited to the "*Twist 'n Kleen*" foam generator and the "*Elephant Ears*" foam applicator, sold by MCCLIMOND.

Such unauthorized use of the NEW WAVE MARKS is likely to cause confusion or mistake and/or to deceive the public.

58. MCCLIMOND has unfairly profited from the infringing actions alleged hereinabove in Paragraph 57.

59. At all relevant times, MCCLIMOND had actual knowledge that NEW WAVE owns the NEW WAVE MARKS, and distinctive trade dress, that NEW WAVE has the exclusive right to use the NEW WAVE MARKS, and distinctive trade dress, and that NEW WAVE was previously and continuously using the NEW WAVE MARKS, and distinctive trade dress, before MCCLIMOND commenced its use of the NEW WAVE MARKS, and distinctive trade dress. NEW WAVE has objected to MCCLIMOND's use of the NEW WAVE MARKS and distinctive trade dress, and MCCLIMOND knows that it lacks authorization or permission to use the NEW WAVE MARKS, and distinctive trade dress, in its business or otherwise. Furthermore, MCCLIMOND has committed the acts complained of herein with knowledge that its imitation of the NEW WAVE MARKS is intended to cause confusion, or to cause mistake, or to deceive. Despite such knowledge, MCCLIMOND has intentionally, maliciously, and without any justification whatsoever failed and refused to discontinue its infringing use of the NEW WAVE MARKS.

60. NEW WAVE has incurred, and will continue to incur, actual and substantial damage as a direct and proximate result of MCCLIMOND's wrongful acts, including, without limitation, injury to its reputation and goodwill, plus the expenditure of attorneys' fees.

61. NEW WAVE has no adequate remedy at law. Ryder has suffered irreparable injury to its goodwill and otherwise, and will continue to suffer irreparable injury unless MCCLIMOND's wrongful acts of infringement are enjoined by the Court. Accordingly, NEW WAVE is entitled to preliminary and permanent injunctive relief under state law.

62. By reason of MCCLIMOND's willful acts, NEW WAVE is entitled to an equitable accounting and to recover MCCLIMOND's profits generated in connection with MCCLIMOND's

wrongful use of the NEW WAVE MARKS, recovery of all damages sustained by NEW WAVE, and an award of costs of this action, and NEW WAVE's profit award should be enhanced and its damages trebled.

63. This is an exceptional case making NEW WAVE eligible for an award of attorneys' fees.

COUNT V
(Violation of Florida Deceptive and Unfair Trade Practices Act)

64. The allegations in paragraphs 7 through 26, inclusive, are incorporated herein by reference.

65. MCCLIMOND's unauthorized use of the NEW WAVE MARKS and distinctive trade dress is likely to cause, and has caused, confusion and mistake as to the source and/or origin of products that Defendant markets and sells bearing the NEW WAVE MARKS and distinctive trade dress.

66. MCCLIMOND's unauthorized use of the NEW WAVE MARKS and distinctive trade dress constitutes an unfair and/or deceptive act or practice in the conduct of trade or commerce and therefore violates the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 et seq. ("FDUTPA").

67. As a result of MCCLIMOND's violations of FDUTPA, NEW WAVE has incurred, and will continue to incur, actual and substantial damages, including, without limitation, injury to its reputation and goodwill, plus the expenditure of attorneys' fees.

68. NEW WAVE has no adequate remedy at law.

69. NEW WAVE has suffered irreparable injury to its reputation and goodwill and otherwise, and will continue to suffer irreparable injury unless MCCLIMOND's wrongful acts are enjoined by the Court.

Prayer for Relief

WHEREFORE, Plaintiff NEW WAVE respectfully requests that the Court enter judgment in its favor and against the Defendants, James (Jim) McClimond, Car Wash Experts, Inc., and Mr. Foamer, Inc., as follows:

- a. As to Counts I-II and Counts VI-V, temporarily, preliminarily, and permanently enjoining each of the Defendants, as well as its employees, agents, representatives, and anyone acting on its behalf or in concert with it, from using for any purpose the NEW WAVE MARKS and distinctive trade dress, and/or any other trademark or service mark belonging to NEW WAVE, and awarding NEW WAVE compensatory, consequential, incidental, and statutory damages against Defendant in an amount to be determined at trial, plus costs and attorneys' fees incurred in relation to this action;
- b. As to Count III, temporarily, preliminarily, and permanently enjoining each of the Defendant, as well as its employees, agents, representatives, and anyone acting on its behalf or in concert with it, from using for any purpose the NEW WAVE proprietary and confidential technical and business information, relating to the NEW WAVE Turbo Foam Generator and related accessories, and awarding NEW WAVE's costs and attorneys' fees incurred in relation to this action; and
- c. For such other and further relief as the Court deems just and proper.

Respectfully,

/s/ John H. Faro
John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiff

Faro & Associates
1395 Brickell Avenue
Suite 800
Miami, FL 33131

email:Johnf75712@aol.com

Phone 305, 761-6921
Fax 305, 726-0029

EXHIBIT 7

**OPPOSER'S RESPONSES TO FIRST SET OF
INTERROGATORIES IN FEDERAL CASE**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Miami Division)**

Case No. 13-cv-22541-Civ-COOKE/TURNOFF

NEW WAVE INNOVATIONS, INC.

Plaintiff,

vs.

JAMES (JIM) MCCLIMOND, MR. FOAMER,
INC., and CAR WASH EXPERTS INC.

Defendants.

DEFENDANTS' FIRST SET OF INTERROGATORIES DIRECTED TO PLAINTIFF

Defendants, James McClimond ("McClimond"), Mr. Foamer Inc. ("Mr. Foamer") and Car Wash Experts Inc. ("Car Wash Experts") (altogether "Defendants"), by and through undersigned counsel, and pursuant to Florida Rule of Civil Procedure 1.340 (a) and (c), propounds the attached Interrogatories to Plaintiff, New Wave Innovations, Inc. ("Plaintiff") to be answered in writing, under oath within thirty (30) days from the date of service, in accordance with Florida Rule of Civil Procedure 1.340 (a) and (c).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail to: **John H. Faro, Esquire**, Faro & Associates, 1395 Brickell Avenue Suite 800, Miami, FL 33131 (JohnF75712@aol.com) and to **Adam D. Palmer, Esq.**, Schoeppl & Burke, PA, 4651 N. Federal Hwy., Boca Raton, FL 33431 (apalmer@schoepplburke.com; asmith@schoepplburke.com) on this 26th day of February 2013.

By: /s/ Steven M. Greenberg
Steven M. Greenberg
CRGO Law
sgreenberg@crgolaw.com
Florida Bar Number 173924

CRGO Law
7900 Glades Road, Suite 520
Boca Raton, FL 33434
Telephone: (561) 922-3845
Facsimile: (561) 244-1062
Attorney for Defendants

DEFINITIONS

1. **"Person"** shall mean the plural as well as the singular and shall include any natural person, corporation, partnership, joint venture, association, government agency and every other form of entity cognizable at law.
2. **"You"** and **"your"** refer to the party to whom these Interrogatories is directed, each and every name by which the party is known or has been known, and each and every employee, attorney, and agent for such party.
3. **"Document"** shall include all records, books of account, work sheets, checks, instructions, specifications, manuals, reports, books, periodicals, publications, raw and refined data, memoranda, graphs, drawings, photographs, notes, advertisements, lists, studies, meeting minutes, working papers, transcripts, magnetic tapes or discs, punch cards, computer printouts, letters, telegrams, e-mails, drafts, proposals, recommendations, and any other data recorded in readable and/or retrievable form, whether typed, handwritten, reproduced, magnetically recorded, coded, or in any other way made readable or retrievable.
4. **"And"** shall mean and/or.
5. **"Or"** shall mean and/or.
6. **"New Wave," "Plaintiff," "you," "yours" and/or "yourself"** shall mean the Plaintiff to this litigation, New Wave Innovations, Inc., and/or any directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on behalf of New Wave.
7. **"Mr. Foamer"** and/or **"Defendant"** shall mean the Defendant to this litigation, Mr. Foamer, Inc., and/or any directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on behalf of Mr. Foamer.
8. **"Car Wash Experts"** and/or **"Defendant"** shall mean the Defendant to this litigation, Car Wash Experts, Inc., and/or any directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on behalf of Car Wash Experts.
9. **"McClimond"** and/or **"Defendant"** shall mean the Defendant to this litigation, James McClimond, and/or any representative, heir, successor, affiliate, assign, employee, officer, principal or agent of McClimond.
10. **"Agent"** shall mean: any agent, employee, officer, director, attorney, independent contractor or any other person acting at the direction of or on behalf of another.
11. **"Third party"** or **"third parties"** refers to individuals or entities that are not a party to this action.

12. The singular shall include the plural and vice versa; the terms "**and**" or "**or**" shall be both conjunctive and disjunctive; and the term "**including**" mean "including without limitation."

13. "**Related to,**" "**discussing**" or "**evidencing**" shall mean: relates to, refers to, contains, concerns, describes, embodies, mentions, constitutes, constituting, supports, corroborates, demonstrates, proves or tends to prove, evidences, shows, refutes, disputes, rebuts, controverts or contradicts.

14. "**Complaint**" shall mean the complaint filed in the law suit captioned *New Wave Innovations, Inc. v. James McClimond et al.*, Case No. 1:13-CV-22541, pending in the United States District Court for the Southern District of Florida, Miami Division.

15. "**Communication**" shall mean any disclosure, transfer, or exchange of information or opinion, however made, written, oral or by electronic means.

16. "**New Wave Products**" shall mean any products sold by New Wave including but not limited to the Turbo Foam Generator and the Elephant Ears Foam Applicator.

17. "**New Wave Marks**" shall mean any trademark used by New Wave in commerce in connection with the sale of the New Wave Products.

18. "**New Wave Trade Dresses**" shall mean any trade dress used by New Wave in commerce in connection with the sale of the New Wave Products.

19. "**Mr. Foamer Products**" shall mean any products sold by Mr. Foamer including but not limited to the Twist N' Kleen Generator.

20. "**Mr. Foamer Trade Dresses**" shall mean any trade dress used by Mr. Foamer in commerce in connection with the sale of the Mr. Foamer Products.

21. "**Mr. Foamer Marks**" shall mean any trademark used by Mr. Foamer in commerce in connection with the sale of the Mr. Foamer Products.

22. "**Car Wash Experts Products**" shall mean any products sold by Car Wash Experts.

23. "**Car Wash Experts Trade Dresses**" shall mean any trade dress used by Car Wash Experts in commerce in connection with the sale of the Car Wash Experts Products.

24. "**Car Wash Experts Marks**" shall mean any trademark used by Car Wash Experts in commerce in connection with the sale of the Car Wash Experts Products.

25. All other words not defined in this section shall include the word's plain meaning which shall also include but not be limited to the definition imputed to them by Merriam-Webster's Collegiate Dictionary, 11th Edition (2008).

INSTRUCTIONS

1. You are to produce the original of each document unless the same is not within your possession, custody or under your control, in which event you are to produce all copies in your possession, custody or control.

2. To the extent precise and complete documents cannot be furnished, such documents as are available shall be supplied.

3. If any privilege is asserted with respect to any documents described in these Interrogatories, please specifically identify the documents and state, as to each document, the precise nature of and the basis for the privilege relied on.

FIRST SET OF INTERROGATORIES

1. Please provide the name, address and position held in Plaintiff's corporation of the person answering these interrogatories.
2. Please describe with specificity the confidential documents allegedly provided by Plaintiff to one or more of the Defendants sometime in October-November 2011, and specify which Defendant the confidential documents were provided to.
3. Please identify the documents that support Plaintiff's contention that one or more of the Defendants received confidential information from Plaintiff sometime in October-November 2011.
4. Please identify the documents that support Plaintiff's contention that one or more of the Defendants qualified or served as a distributor of the New Wave Products.
5. Please identify the documents, including but not limited to any survey evidence, that support Plaintiff's contention that the New Wave Marks are well-known, famous, have acquired secondary meaning and/or that the public associates the New Wave Marks with Plaintiff, and specify the New Wave Mark to which the documents pertain to.
6. Please identify the documents, including but not limited to any survey evidence, that support Plaintiff's contention that the New Wave Trade Dresses are well-

- known, famous, have acquired secondary meaning and/or that the public associates the New Wave Trade Dresses with Plaintiff, and specify the New Wave Trade Dress to which the documents pertain to.
7. Please describe with specificity the type of expenditures made by Plaintiff in advertising and promoting the New Wave Products, the New Wave Marks and the New Wave Trade Dresses, and specify the New Wave Product, Mark or Trade Dress to which the documents pertain to.
 8. Please identify the documents that support Plaintiff's contention that Plaintiff made substantial expenditures in advertising and promoting the New Wave Products, the New Wave Marks and the New Wave Trade Dresses, and specify the New Wave Product, Mark or Trade Dress to which the documents pertain to.
 9. Please describe with specificity instances of actual confusion from consumers regarding the source of any Car Wash Experts Products, including but not limited to confusion where consumers believed that the Car Wash Experts Products originated from New Wave.
 10. Please describe with specificity instances of actual confusion from consumers as to the source of the Mr. Foamer Products, including but not limited to confusion where consumers believed that the Mr. Foamer Products originated from New Wave.

11. Please describe with specificity instances of actual confusion from consumers between the New Wave Marks and the Car Wash Experts Marks, and provide the name of the Car Wash Experts Mark and the name of the New Wave Mark which allegedly created confusion.
12. Please identify the documents that support Plaintiff's contention that there exists actual confusion from consumers between the New Wave Marks and the Car Wash Experts Marks.
13. Please describe with specificity instances of actual confusion from consumers between the New Wave Marks and the Mr. Foamer Marks, and provide the name of the Mr. Foamer Mark and the name of the New Wave Mark which allegedly created confusion.
14. Please describe with specificity instances of actual confusion from consumers between the New Wave Trade Dresses and the Car Wash Experts Trade Dresses, and provide the name of the Car Wash Experts Product and the name of the New Wave Product which allegedly created confusion.
15. Please identify the documents that support Plaintiff's contention that there exists actual confusion from consumers between the New Wave Trade Dresses and the Car Wash Experts Trade Dresses.

16. Please describe with specificity instances of actual confusion from consumers between the New Wave Trade Dresses and the Mr. Foamer Trade Dresses, and provide the name of the Mr. Foamer Product and the name of the New Wave Product which allegedly created confusion.
17. Please identify the documents that support Plaintiff's contention that there exists actual confusion from consumers between the New Wave Trade Dresses and the Mr. Foamer Trade Dresses.
18. Please identify the documents that support Plaintiff's contention that McClimond, Car Wash Experts and/or Mr. Foamer made any claims to third parties that New Wave's Turbo Foam Generator was his/its invention.
19. Please identify the documents that support Plaintiff's contention that one or more of the Mr. Foamer Products incorporates the New Wave Trade Dresses including but not limited to the trade dress of New Wave's Turbo Foam Generator and/or Elephant Ears Foam Applicator.
20. Please identify the documents that support Plaintiff's contention that one or more of the Car Wash Experts Products incorporates the New Wave Trade Dresses including but not limited to the trade dress of New Wave's Turbo Foam Generator and/or Elephant Ears Foam Applicator.

21. Please identify the documents that support Plaintiff's contention that products manufactured or distributed by McClimond, Mr. Foamer and/or Car Wash Experts have a brand name including the term "turbo."
22. Please identify the documents that support Plaintiff's contention that products manufactured or distributed by McClimond, Mr. Foamer and/or Car Wash Experts have a brand name including the term "elephant."
23. Please identify the documents that support Plaintiff's contention that products manufactured or distributed by McClimond, Mr. Foamer and/or Car Wash Experts have a brand name including the terms "ear" or "ears."
24. Please identify the documents that support Plaintiff's contention that Plaintiff owned one or more pending patent applications at the time of filing of the Complaint.
25. Please identify the documents that support Plaintiff's contention that Plaintiff was the exclusive licensee to one or more pending patent applications at the time of filing of the Complaint.
26. Please identify by application serial number all patent applications assigned to or licensed by New Wave at any time during the year 2013.

27. Please state the filing dates for each patent application identified as having been assigned to or licensed by New Wave at any time during the year 2013.

28. Please identify the documents that support Plaintiff's contention that Mr. Foamer, Car Wash Experts and/or McClimond made statements that New Wave does not own any pending patent applications or issued patents.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 13-CV-225421-COOKE/TORRES

NEW WAVE INNOVATIONS, INC.)
)
Plaintiff)
vs.)
)
JAMES (JIM) MCCLIMOND (AN INDIVIDUAL),)
MR. FOAMER, INC.) (A FLORIDA CORPORATION) &)
CAR WASH EXPERTS, INC. (A FLORIDA)
CORPORATION))
)
Defendants)
	/

PLAINTIFF NEW WAVE INNOVATIONS INC. HEREIN FILES ITS NOTICE OF COMPLIANCE WITH COURT ORDER [DE 145] REQUIRING SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES

The Plaintiff, New Wave Innovations, Inc. ("NEW WAVE" or "NWI") herein files its *Notice Of Compliance With Court Order [De 145] Requiring Supplemental Response To Defendants' First Set Of Interrogatories*

The NWI Supplemental Response are annexed hereto

Respectfully,

/s/ John H. Faro
John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 13-CV-225421-COOKE/TORRES

NEW WAVE INNOVATIONS, INC.)
)
Plaintiff)
vs.)
)
JAMES (JIM) MCCLIMOND (AN INDIVIDUAL),)
MR. FOAMER, INC.) (A FLORIDA CORPORATION) &)
CAR WASH EXPERTS, INC. (A FLORIDA)
CORPORATION))
)
Defendants)
	/

**PLAINTIFF NEW WAVE INNOVATIONS SUPPLEMENTAL REPONSE
TO DEFENDANT FIRST SET OF INTERROGATORIES**

The Plaintiff, New Wave Innovations, Inc. ("NEW WAVE" or "NWI") herein responds to the Defendant, First Set of Interrogatories Directed to Plaintiff in numbered paragraphs corresponding to the numbered paragraphs of the Request.

1. Michael J. Ross, CEO NEW WAVE INNOVATIONS, INC. c/o Plaintiff's Counsel
2. All confidential information was conveyed to the Defendant, Jim McClimond, in the course of several telephone conferences occurring from about May 2011 through about December 2011, (some of which lasted more than 1 hour), incident to his expression of his interest as an "investor" and/or as a "partner" with the NWI in the distribution of the NWI Turbo Foam generator. These telephone conference were conducted on a speaker phone located at the NEW WAVE office in Lodi, California. At least one (1) additional person was present in the NWI offices and overheard many of these phone calls Mr. Ross' telephone number at the time was 209-298-7667.

These discussions included Confidential Business and Technical Information, as follows:

- a. Business Information, as related to the NEW WAVE Turbo Foam Generator and related accessories, financial information as to cost and profit margins, potential sources for product components, identification of potential and existing customers on the East coast and marketing projections;
- b. Technical Information, as related to the NEW WAVE Turbo Foam Generator and related accessories, discussion of operational parameters of the individual components of the Turbo Foam Generator, and the interaction of these components within the Generator, the various component parts which were evaluated by NEW WAVE in the development of Turbo Foam Generator, (both components that worked and components that did not work), and the performance characteristics of each of these components, identification of components that did not work (in response to suggestions by Defendant, Jim McClimond, specific inquiries relative to different materials traditionally used in such foam generators), the sources of components which were ultimately selected for the commercial configuration of the Turbo Foam Generator.
- c. The T-Mobile records of the conversations between Michael Ross and Jim McClimond are reflected upon the bills for Mr. Ross's cell phone (209, 298-7667), have been requested from T-Mobile and, are as yet unavailable from T-Mobile. These telephone shall confirm the date and frequency of these teleconferences. I believe the date and substance of these teleconference are reflected in my March 27, 2014, deposition taken by Defendants in the matter,

See March 27, 2014, Ross Deposition Tx @ page 162, line 3 to page 164, line 17. .

3. McClimond testimony at his March 25, 2014, Deposition (Tx, @ page 115), identified/acknowledged the dimensions, arrangement and composition of the components of the insert for his Twist 'N Kleen foam generator
4. There are no written distributor agreements between Defendants and NWI.
5. There are no survey documents. Evidence of recognition of NWI marks is largely anecdotal. Widespread dissemination of marketing pamphlets over internet, NWI web page and trade show attendance depicts such trademarks as originating with NWI . The extent of internet and/or email dissemination of the NWI catalogs, promotional materials and the like are reflected in Trade Show announcements which were disseminated to the current and potential customers, and holiday/seasonal cards, e.g. Halloween, Christmas, etc., NWI production Bates Nos 000209-277. The extent of the extent of dissemination of the NWI trademarks is reflected in the Confidential Customer List provide in response to the Defendants Request for Documents, NWI production Bates Nos.000040-000208
6. There are no survey documents. Evidence of recognition of NWI distinctive trade dress is largely anecdotal. Widespread dissemination of marketing pamphlets over internet, web page and trade show attendance depicts such trade dress as originating with NWI. Recognition of the NWI Turbo Foam Generator as the industry leader of foam generator products, and the willingness to pay a premium for its products. The extent of internet and/or email dissemination of the NWI catalogs, promotional materials and the like are reflected in Trade Show announcements which were

disseminated to the current and potential customers, and holiday/seasonal cards, e.g. Halloween, Christmas, etc., NWI production Bates Nos 000209-277. The extent of the extent of dissemination of the NWI trademarks is reflected in the Confidential Customer List provide in response to the Defendants Request for Documents, NWI production Bates Nos.000040-000208

7. The NWI advertising and promotional expenses are approximately \$50,000 to \$75,000, and included magazine adds, trade show promotions, coupon discounts/incentives and in-house contacts with potential customers. The NWI advertising and promotional activities, and expenses, are reflected in my March 27, 2014, deposition taken by Defendants in the matter, March 27, 2014, Ross Deposition Tx @ 27, lines 1-20
8. The advertising and promotional expenses are reflected in the printed reports generated by the accounting system, which is maintained by NWI at its company headquarters in Lodi, California.
9. There are no instances of actual confusion with CWE products
10. The instances of actual confusion with Mr. Foamer are reflected and occur primarily at the trade shows where both the NEW WAVE products and FOAMER products are being concurrently promoted for sale to the same customers. A typical example of such actual confusion is February 17, 2014, email from Chad White to NWI, NWI production to FOAMER Bates Nos 000428
11. There are no NWI marks which conflict with CWE marks
12. See response to Interrogatory No. 11


13. The instances of actual confusion with Mr. Foamer are largely anecdotal. The occurrence and frequency of actual confusion of consumers is at the trade shows for the car wash industry. The confusion is based upon the similarities in the product designs (trade dress) for the Turbo Foam Generator and the Elephant Ears foam applicator. See also response to Interrogatory No. 10
14. There is no instances of actual confusion with any trade dress of CWE
15. See response to Interrogatory No. 14
16. See response to Interrogatory Nos. 10 & 13
17. See response to Interrogatory Nos. 10 & 13
18. NEW WAVE has for some time been queried as to the inventorship of its Turbo Foam Generator, including the McClimond contention that he was the inventor. These queries came from a variety of sources and was calculate to inject uncertainty and confusion among the distributors as to the ownership of the proprietary Turbo Foam Generator design and technology. This questioning of the inventorship of the patent rights prompted the dissemination of a Cease & Desist letter from NEW WAVE counsel (Statutory Notice under 35 USC 154), in which counsel identified a number of pending patent applications, filed and owned by Michael Ross relating to the Turbo Foam Generator. As noted in an earlier response to this Interrogatory, an email reporting McClimond's claim of inventorship was sent to NEW WAVE in about January/February 2012, in which McClimond was reported to have stated to a potential customers that McClimond not Michael Ross, was the inventor. That email has been misfiled and could not be located at the time of this response.

19. Foamer product literature of the parties depicts confusingly similar product designs/configurations. These confusingly similar designs/configurations are evident upon comparison, for example, NEW WAVE product literature Bates Nos. 000278-000302 and FOAMER product literature Bates Nos. 000432-000433 – all such documents are in the Defendants’ possession
20. There are no CWE documents
21. Most, if not all of the NWI promotional materials, which depict the NWI Turbo Foam Generator include the work “Turbo” in reference to its Turbo Foam Generator. The NWI marketing materials for the Turbo Foam Generator have been previously provided to Defendants, Bates Nos. 000278-000302.
22. Most, if not all of the NWI promotional materials, which depict the NWI Elephant Ears foam applicator include the work “Elephant “in reference to its Elephant Ears foam applicator. The NWI marketing materials and product literature for the NWI Elephant Ears foam applicator have been previously provided to Defendants, Bates Nos. 000278-000302
23. See response to Interrogatory No. 22.
24. All Patent Office filing receipts for patent applications relating to the NWI Turbo Foam Generator reflect ownership by Michael Ross – all such receipt have been previously produced to Defendants. The authorization of NWI by Ross to use his inventions and proprietary product designs for the manufacture and sale of products incorporating his proprietary designs and inventions, is reflected in the NWI minutes of a Board of Director’s meeting, dated August 12, 2012. These minutes acknowledged Ross’ authorization of NEW WAVE to manufacture and sell 100,000

units of the Turbo Foam Generator. Insofar as the inventor, Michael Ross, is also the CEO of NEW WAVE, he is duty bound/constrained by his office from authorizing others to do the same (denigrate from the rights conveyed to NEW WAVE), and accordingly, this Ross authorization comprises, in effect, an exclusive, field of use restricted (car wash products) license, under the Ross proprietary designs and patent application as related to the NWI products. This authorization is be confirmed and ratified in a formal license agreement, which is presently in preparation.

25. See response to Interrogatory No. 24 – NWI is authorized to manufacture and sell products covered by the Ross pending patent applications and proprietary designs in accordance NWI corporate minutes dated August 12, 2012
26. The filing receipt for the currently pending US national patent application has been provided to Defendants' counsel under the Protective Order entered in this case – **“Confidential – Attorney Eyes Only”** – and that designation remains in effect. Recently, Ross has filed a PCT (International) patent application, based upon his prior filed non-provisional utility application, and that filing receipt has yet to be received – which receipt is also to be provided when received as **“Confidential – Attorney Eyes Only - Both the US national application and the PCT application (filed on April 25, 2014) are currently pending; and, the PCT application claims priority to both provisional and non-provisional US patent application, to which it corresponds.**
27. The US national, non-provisional utility patent application was filed on or about April 15, 2013.
28. See response to Interrogatory No, 18.

Pursuant to 28 USC 1726, I Michael J. Ross, hereby declare under penalties of perjury, that the Answers to the foregoing interrogatories, where stating factual information, are truthful, and where based upon information and belief, such statements are believed to be truthful.



Michael J. Ross May 8, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document, filed through the ECF system, will be sent electronically to the registered participants, as identified in the Notice of Electronic Filing (NEF), and that paper copies will be sent to the individuals indicated as non-registered participants, (if any), as per the attached Distribution List, on this 8th day of May, 2014.

Respectfully,

/s/ John H. Faro
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